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No. 90-1764

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

INDEPENDENT FRUIT AND PRODUCE COMPANY, et al.,
Petitioners,

v.

CENTRAL STATES, SOUTHEAST and SOUTHWEST AREAS PENSION FUND, et al.,
Respondents.

REPLY BRIEF IN SUPPORT OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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INTRODUCTION

The Opposition of Respondents, Central States, Southeast and Southwest Areas Pension Fund and Howard McDougall (together "Central States"), to the Petition for Writ of Certiorari raises significant factual and legal issues not treated by the Petition. Most importantly, contrary to the evidence and the trial court's findings, Central States implies or directly argues that: (1) there is a standard definition of "casual employee" to which all collective bargainers subscribe; (2) that this standard definition was known to Central States and relied upon by it (Brief in Opp. 4); (3) that had Central States known this standard definition was not shared by Petitioners, Central States would have rejected the thirty-year series of collective bargaining agreements (Id. at 9); (4) that

Petitioners concealed their "subjective intentions" to use this supposedly non-standard definition (Id. at 4); and (5) that Central States was, moreover, "induced to rely" upon the standard definition (Id. at 3). None of these assertions is supported by the record.

Only the first argument, that there is a binding standard definition of the phrase "known as 'casual employees' (casuals)", was addressed in the Petition for Writ of Certiorari. While such a standard definition does not exist, discussion is quickly precluded by this Court's prior ruling that analysis of labor agreements does not cease with the turning of the dictionary's last page. NLRB v. C & C Plywood Corp., 385 U.S. 421, 430 (1987).

DISCUSSION

1. Central States Relied Upon No Particular Definition of the Term "known as 'casual employee'" in Conducting the Audits

Factually, the argument that Central States relied upon a standard definition is unfounded. When Central States audited Petitioners, and for some time thereafter, it had no definition of "casual employee." Neither the District Court nor the Court of Appeals found that any definition was held by Central States at the time of the audit. Such a finding would be in direct conflict with the testimony of Central States' employee, Michael D'Onofrio, who was its endorsed witnesses on the meaning of "casual employee" and who had been active in the audits of Produce Row. The crux of Central States' own testimony is that casual status must be determined on a

"case-by-case basis" (Appendix to this volume 9-10). There was no definition formulated by Central States at the time of the audit (Id. at A1-A5).

Thus, Central States can claim only that, as a matter of law, it is entitled to rely upon the dictionary and, that as an additional matter of law, all parties are on constructive notice of the definition contained in Black's Law Dictionary (5th ed.). No single case for this proposition can be found, with the possible exception of the Eighth Circuit's decision in this case. Central States' own search for a definition on a case-by-case basis is predicated upon the fact that the particular situation of the parties to the collective bargaining agreement--employers, unions and employees, alike--makes a difference (Id. at A9-A10).

2. Central States Did Not Reject a Produce Row Contract Which was Submitted to it Following the Audit

Central States' assertion that it would have rejected any collective bargaining agreement mandating contributions for some workers and none on behalf of similar situated employees is belied by its conduct. The Eighth Circuit correctly notes that "The district court rejected any argument based on splitting the bargaining unit, and no such argument has been made on appeal." Appendix to Petition A40, n. 4. After filing suit against Petitioners in 1984, with full knowledge of the meaning ascribed by the parties to "known as 'casual'," in 1985, Central States accepted, without any objection, a contract between Petitioners and the Union containing the same language. By this time Central States was fully aware

of the issue and the parties' understanding of the term. Thus, Central States did not reject a contract containing what it believed to be a split bargaining unit.

3. Petitioners' Intentions Are to be Determined From All Legally Admissible Evidence

The term "subjective intentions" which appears in Central States' Brief in Opposition has no clear meaning unless taken to imply that Petitioners, with the aid and assistance of the Union, concealed aspects of their conduct from Central States. Brief in Opp. 4. Use of this term appears to be juxtaposed to the phrase "real intent." Id. at 9. No evidence at trial pointed to concealment of any "real intent", nor was a policy of concealment raised in the Court of Appeals by Central States. As is amply stated in the Petition, the traditional

tools of labor contract interpretation require examination of more than the dictionary to determine the parties' intentions; they require that courts utilize all legally admissible evidence. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. ---, 109 S. Ct. 948, 955 (1989). The dictionary definition formed no part of the parties' intentions, subjective or otherwise.

4. Central States Was Not "Induced to Rely Upon" Anything

Central States claims it was "induced to rely upon" the collective bargaining agreements and presumably the dictionary definition. Brief in Opp 3. No evidence of any inducement by Petitioners, the Union or the employees was presented at trial. No evidence was brought forth that Petitioners lied to Central States. To the contrary, when Central States inquired into Produce Row

practice, it was told the facts. Appendix to Petition A221-23.

CONCLUSION

This is not a case of concealment or bad intentions. This case raises the issue of where does construction of labor contracts begin and end when the rights of pension trustees are affected. As is mentioned by the Brief in Opposition, this case engenders significant issues concerning the interplay of Section 515 of ERISA and traditional labor contract interpretation. Brief in Opp. 9. Thus, this Court should grant the Petition and issue its Writ of Certiorari.

Respectfully submitted,

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APPENDIX

EXCERPTS FROM THE DEPOSITION OF MICHAEL D'ONOFRIO INTRODUCED IN EVIDENCE AT TRIAL

Q. [Mr. Pasewark, Petitioners' counsel] Does Central States have a definition of casual?

A. [Mr. D'Onofrio, Respondents' endorsed witness regarding the meaning of "casual"] Yes.

Q. What is the source of Central States' definition of casual?

A. Common knowledge, which is supported in various dictionaries, which is also supported by opinions received by various attorneys, both internally and outside counsel.

Q. What dictionary are you aware of that defines casual employee?

A. I don't remember the exact name, but I have seen it several dictionaries.

Q. You are aware that there are several dictionaries that have the term casual employee defined?

A. I am not sure if it says casual employee or casual worker, but it has some reference to some type of casual employment, yes.

Q. Have you looked up those terms independently--casual and employee--and formed--

. . .

A. I have had people walk up to me and hand me a dictionary and say, 'See, here

it is.' And I don't remember how it was phrased.

Q. . . . So, you don't know whether the term casual employee appeared in any dictionary?

A. Yes.

Q. Do you believe you looked at the term casual?

A. Yes.

Q. And looked at the term employee?

A. Yes.

Q. Separately?

A. Yes.

Q. And then combined the results?

MR. HELFREY [Respondents' counsel]: I object. Look in Black's Law Dictionary. It is in there. You are getting argumentative.

Q. (BY MR. PASEWARK) Is that the dictionary you used?

MR. HELFREY: He doesn't remember.

A. I don't recall the dictionary. Just people have shown me, 'Look, here it is.'

Q. (BY MR. PASEWARK) Are there any other sources other than dictionaries upon which you have relied in reaching a determination of what a casual employee is?

A. I have relied on memoranda that we received from internal counsel.

Q. Any others?

A. And there have also been references made from our outside attorneys -- references made by outside attorneys as to what casual employees are.

Q. When was the first time that you saw this term defined in a dictionary?

A. I don't recall

Q. Before or after 1983?

A. After 1983.

Q. Before or after 1986?

A. I don't recall.

Q. Before or after you conducted the Lamperson audit [the first audit of a Produce Row employer]?

A. I don't recall.

Q. When was the first time you saw any other source of information concerning the definition of casual employee?

A. I have seen it on numerous occasions throughout my career in the field audit division, from our attorneys.

Q. Did you ever see a definition of the term casual employee prior to conducting the Lamperson audit?

A. I don't recall.

Q. How do you communicate the definition of a casual employee to persons within the field audit division?

A. We do it in training seminars that we have had specifically as people are hired into the division. We also have training seminars for updates on procedures. So, it is through an education program.

Q. Do you conduct these educational seminars?

A. I used to.

Q. What did you tell them a casual employee was?

A. A casual employee is someone who works on an infrequent basis.

Q. And how many hours do they have to work before they work infrequently?

A. We don't have a specific definition as to how many hours.

Q. Did you ever have occasion to define the term casual employee for your field audit division prior to conducting the Lamperson audit?

A. I don't recall.

Q. Did the Lamperson audit or any of the Produce Row cases cause Central States to redefine casual employee?

. . .

A. I don't believe so.

Q. . . . [W]as this one of the first audits you ever conducted?

A. One of the first group of audits.

Q. Had you ever, prior to the Lamperson audit, had occasion to deal with the term casual employee?

A. Yes, I did.

Q. And when was that?

A. That was in -- it was at least as early as August, 1983.

Q. And what context did that arise in?

A. It was in the audit of a freight company.

Q. Were there any times after the audit of the freight company and before the audit of Lamperson where you had occasion to define that term?

A. I don't recall.

. . .

Q. . . . What was the definition of casual employment with that freight company?

A. That freight company was under the National Master Freight Agreement.

Q. And the National Freight Agreement contains a definition of casual?

A. I believe it does.

Q. And do you know what that definition is?

A. Not offhand, no.

Q. . . . This might have been your second occasion, with the Lamperson audit, to look at the term casual?

A. That is right.

. . .

Q. . . . Do you recall whether any [memorandum from counsel] were generated prior to the Lamperson audit?

A. No, I don't recall.

. . .

Q. Did you ever have occasion to look up a dictionary definition of casual employee prior to the Lamperson audit?

A. I don't believe so, but I don't recall.

Q. Is the dictionary definition that you have seen of casual employee identical to the one contained in the National Master Freight Agreement?

A. I don't know.

Q. Have you ever compared the two?

A. No.

Q. Are there any other sources -- aside from dictionaries and memoranda from internal and external counsel -- that you rely upon in defining casual employee?

A. Common knowledge.

Q. And what is common knowledge?

A. Just experience in working with audits in the field audit division.

. . .

Q. Do you believe it to be common knowledge among employers in the produce industry?

A. I don't know.

. . .

Q. . . . Is it common knowledge among those persons who negotiate collective bargaining agreements for unions?

. . .

A. I don't know.

Q. Is it common knowledge for those persons who were employed subject to a collective bargaining agreement?

. . .

A. I don't know.

Q. . . . Is it conceivable to have a casual employee who works twenty hours a week?

A. I think I would need more facts to be able to answer that question.

Q. Have you ever judged someone to be a casual employee who worked twenty hours a week?

A. For just one week.

Q. For just one week.

A. They never worked again?

Q. They never worked again.

A. I am sure we have.

Q. Have you ever deemed somebody to be a regular employee who worked twenty hours one week and never worked again?

A. I don't know.

Q. Have you ever deemed somebody to be a regular employee who worked forty hours a week and never worked again?

A. I don't know.

Q. Have you ever deemed somebody to be a regular employee who worked eighty hours a week and never worked again?

A. I don't know.

Q. Have you ever deemed somebody to be a regular employee who worked two consecutive weeks and never worked again?

A. Are you talking about from the field audit standpoint or from my personal experience?

Q. From the field audit standpoint.

A. I don't know.

Q. Have you ever deemed somebody to be a regular employee who worked three consecutive weeks at twenty hours a week?

A. I don't know.

Q. How about four consecutive weeks?

A. I don't know.

Q. Five consecutive weeks?

A. At forty hours?

Q. Twenty.

A. I don't know.

Q. If they worked a whole year at twenty hours a week, have you ever deemed somebody to be a regular employee -- and they never worked again?

A. Yes.

Q. Would that mean, in your judgment, they were a regular employee?

A. Yes.

Q. If he worked six months, twenty hours a week and never worked again?

A. Yes.

. . .

Q. . . . If he worked three months at twenty hours a week, in your opinion is he a regular employee?

A. I would need additional facts.

Q. What type of facts?

A. I would need to know what he was doing. I would need to see the wage involved. I would need to see what the contract was. It would depend on the employer and the local union. There is a bunch of variables. And we review those

on a case-by-case basis. It would depend on the probation period in the contract.